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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 781

SEARS, ROEBUCK AND CO.,

AND

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,
Petitioners.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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THE SUPREME-BARRISTER PRINTING COMPANY, CHICAGO

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JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

AND

MISCELLANEOUS DRIVERS AND HELPERS UNION, LOCAL NO. 610, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners Sears, Roebuck and Co., Terminal Freight Cooperative Association and Terminal Freight Handling Co., charging parties before the National Labor Relations Board, seek a writ of certiorari before judgment in the

court of appeals to review the Order of the District Court for the Eastern District of Missouri denying to the charging parties either the right to appear and participate as full party-litigants in that court, in a proceeding brought under Section 10(l) of the National Labor Relations Act, or even the right to intervene therein.

Petitioners seek this writ before judgment in the appellate court in view of (i) the likelihood of an imminent recurrance of the injury suffered as a result of the district court's Order; (ii) the delay which would result from awaiting the decision of the court of appeals which will not hear oral argument in the case until the Spring of 1971; (iii) the fact that the same issues involved here are currently before this Court in another pending case.

OPINIONS BELOW.

The unreported Order of the district court below issued on July 8, 1970 (App. J, p. A 58).

The petitioners' appeals from this Order are currently pending in the Court of Appeals for the Eighth Circuit.

JURISDICTION.

The Order of the district court denying to petitioners the status of "parties" under Section 10(l) of the Act or the right to intervene in such proceedings was issued on July 8, 1970.

An appeal of this Order was filed in the United States Court of Appeals for the Eighth Circuit by Sears, Roebuck and Co. on July 10, 1970, and by Terminal Freight Cooperative Association and Terminal Freight Handling Co. on July 16, 1970. These appeals are currently pending.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Rule 20 of this Court.

QUESTIONS PRESENTED.

(1) Whether charging parties before the National Labor Relations Board, whose charges give rise to the mandatory filing of the Regional Director's petition for injunctive relief under Section 10(l) of the National Labor Relations Act, possess the status of "parties" in the ensuing district court proceedings filed pursuant to their charges and on their behalf?

(2) Whether such charging parties may intervene in the district court proceedings brought pursuant to Section 10(l) of the Act and which result from the filing of their charges with the Board.

(3) Whether this Court should decline on the ground of mootness to adjudicate the merits of an appeal in which no immediate relief is required, but where the disputed issues remain unresolved, will result in recurring injury to the same and similar parties, will continue for the same reason to evade review, and will be fully and actively litigated by interested and adverse parties.

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, § 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*, are set forth in App. U, p. A. 112.

STATEMENT OF THE CASE.

This case originated from charges filed with the Board by petitioners herein, alleging that Respondent Union had violated their rights by subjecting them to unlawful secondary boycott activity proscribed by Section 8(b)(4)(i)(ii)(B) of the Act, 29 U. S. C. § 158(b)(4)(i)(ii)(B).

The Union commenced its picketing of Sears on June 9, 1970 and of Terminal[1] on June 10, resulting in the afore-

1. Petitioner Terminal Freight Cooperative Association is a non-profit shippers' association consisting of forty-five independent companies which receives less-than-carload and less-than-truckload shipments, consolidates such shipments into carload lots in order to

mentioned charges filed by Sears on June 10 and by Terminal on June 12, 1970. Following a preliminary investigation of the merits of these charges, as is required by Section 10(l) of the Act, Respondent Joseph Solien, Regional Director of the Board, on June 16, 1970, concluded that there existed reasonable cause to believe that Respondent Union was engaging in unfair labor practices, as charged, and that complaints of the Board should issue.

Although the terms of Section 10(l) explicitly provide that, upon making the described findings, the Regional Director "shall" petition a district court for injunctive relief, the Director ignored this mandatory direction and refused to seek such relief pending the conclusion of his unilateral settlement negotiations with Respondent Union.

Since petitioners continued to be subjected to Respondent Union's picketing, and since the Director persisted in his refusal to seek injunctive relief on their behalf, petitioners Sears and Terminal, on June 18 and June 19, 1970 respectively, filed a Complaint for Mandatory Injunction in the district court. This constituted only the first of a series of legal actions which petitioners, as aggrieved charging parties before the Board, were forced to institute as a result of this unlawful picketing, in order both to perfect and to protect their statutorily guaranteed rights. The instant appeal constitutes another in that series of actions.

Shortly after the petitioners filed their Complaint for Mandatory Injunction, on June 29, 1970 the Director filed his "Petition for Injunctive Relief Under Section 10(1)"

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secure the advantages of lower costs through large volume shipment, and reships such goods to members' plants at locations throughout the United States. Petitioner Terminal Freight Handling Company is a non-profit Delaware corporation engaged in the handling, consolidation and trans-shipment of freight as manager of the Association at more than forty terminals throughout the United States.

For ease of reference these petitioners jointly will be referred to as "Terminal" herein.

(App. A, p. A p. A 1), followed, on July 2, 1970, by the issuance of his "Order Consolidating Cases, Complaint and Notice of Hearing" (App. F, p. A 34).[2]

Upon the filing of the Director's injunction petition, these petitioners sought to clarify their status in the resulting district court proceedings. Accordingly, on June 30, 1970, Sears' counsel filed an appearance denoting Sears as a "party" and, on July 1, 1970, Terminal's counsel filed a "Motion to Appeal and Participate as Full Parties Litigant". (App. C, D and E, at pp. A 26, A 28 and A 30, respectively.)

Throughout this period, the Director had carried on unilateral settlement negotiations with the Union, resulting in a "Stipulation" which the Director's agents circulated to petitioners for their approval. (App. G, p. A 44.) The Director and the Union intended this Stipulation to serve in lieu of the injunctive relief for which the Director had earlier petitioned. To the end of achieving such an informal agreed settlement in lieu of the injunction which Section 10(1) commanded the Director to seek, the Director failed to seek a hearing on the petition which he had filed.

The petitioners—believing (i) that the remedial provisions of the Stipulation were inadequate; (ii) that they were entitled to a court-ordered injunction rather than an informal, privately negotiated, non-self-enforcing Stipulation; and (iii) that the direction in Section 10(l) that the Director "shall" seek injunctive relief meant more than that

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2. As a result of the filing of the Director's petition, Sears withdrew its Complaint for Injunction. Terminal, however, moved for a partial dismissal of its Complaint insofar as it sought to compel the Director to file for that petition, but amended its Complaint to seek a declaratory judgment of the propriety both of the Director's initial refusal to proceed and of the still-existing internal agency rule which dictated or permitted his refusal. This case is currently pending in the district court (70 C 300 (3)). Terminal's amended complaint is set out in App. B, p. A 11.

the Director, having filed a petition under legal duress, may thereafter ignore his petition as if it had never been filed at all—filed specific and detailed objections to the proposed Stipulation.[3]

On July 8, 1970, the district court disapproved the proffered Stipulation but held that the petitioners were not parties to the Section 10(l) proceedings and would not be allowed to intervene, although they were permitted certain lesser rights including the right to be informed of all actions taken in the case, to be present by counsel at all hearings, to keep the court advised of pertinent developments and to receive copies of all documents filed. The court also set the matter for hearing, on its own motion, for July 15, 1970. (App. J, p. A 58.)

The petitioners thereupon commenced preparation for that hearing as, in Terminal's case, for example, by preparing extensive Interrogatories to be served upon Respondent Union.

However, on July 9, 1970, representatives of the Director and the Union proffered an amended Stipulation to the district court judge in his chambers. (App. K, p. A 60.) The judge approved that Stipulation without the presence of the petitioners, without any advance notice to them that such a meeting was to be held, without affording them an opportunity to participate in the drafting of the document and without affording them an opportunity to state any further objections to it. Petitioners learned of the meeting and the court's approval of the amended Stipulation only after those events had transpired. Moreover, the court's approval of that Stipulation had the effect of can-

3. On July 7, 1970, Sears formally filed five written Objections and Terminal filed a "Motion to Interdict Entry of and Objections to Proposed Stipulation", by way of documenting their opposition to the terms of the Stipulation which was negotiated and drafted without their participation. (App. H and I, at pp. A 51 and A 54 respectively.)

celling the scheduled hearing of July 15, preventing petitioners from filing prepared Interrogatories and from arguing to and persuading the court that no relief other than the statutorily-specified injunction was appropriate either generally or specifically in this case. Finally, the court's action violated its own order of July 8 which guaranteed to petitioners the right to notice of all proceedings in the case and the right to participate therein, and violated petitioners' right, expressed in Section 10(l), to a hearing at which it could "appear by counsel and present any relevant testimony" in connection therewith.

Having circumvented its statutory duty to seek interim injunction relief under Section 10(l), the Board then sought to dispose of the underlying case by means of a "Settlement Stipulation" purporting to remedy the charged unfair labor practices. A document so entitled was submitted to the charging parties on about July 24, 1970, bearing the signatures of agents of both the Union and the Director. (App. N, p. A 68.) The charging parties opposed such a disposition of their charges on the grounds that they lacked adequate information to judge whether all the substantive violations had been remedied, that they had not been afforded any opportunity to participate in the negotiation and drafting of this proposed settlement, and that the document lacked any findings of fact such as are required under Section 10(c) of the Act and without which it would be impossible to determine whether any resumption of the Union's picketing would violate the presumed proscriptions of the settlement.

In order to prevent the Director's approval of the settlement over the charging parties' objections, on July 17, 1970 the charging parties filed a Complaint in the district court alleging that the Director had violated their rights under the Act and the Board's Rules and Regula-

tions by excluding them from settlement discussions and depriving them of essential facts in connection with settlement deliberations, and sought to enjoin the Director from approving any settlement or engaging further in settlement discussions without the informed participation of the charging parties. (App. Q, p. A 89.)

On July 30, 1970 the district court sustained the Director's motion to dismiss the cause for lack of jurisdiction. (App. R, p. A 98.) The charging parties filed an appeal of the district court's decision and sought a temporary stay of that decision from the Eighth Circuit Court of Appeals pending resolution of the appeal. Such a stay was granted on August 7, 1970 but, upon further consideration, was vacated on August 10.

On August 11, 1970 the charging parties filed in this Court an application for a temporary restraining order staying the district court's order and temporarily enjoining the Director. On August 19, 1970 this Court, by Mr. Justice Blackman, denied the application. (The gist of the parties' contentions are set out in Apps. S and T at pp. A 99 and A 104.)

In sum, the history of this case reveals a series of actions taken by the Board's agents and the inferior courts whose effect has been to deprive the charging parties of rights guaranteed them in Section 10(l) and of the benefits which Congress intended that Section to afford. First, the Director declined to petition for injunctive relief despite the mandatory duty imposed upon him to do so in aid of unlawfully picketed charging parties; second, the charging parties were neither recognized as "parties" nor permitted to intervene nor meaningfully permitted to participate in the district court consideration of the Director's tardily filed injunction petition; and third, the Director

refused to permit the charging parties to participate in the discussions and negotiations leading to the attempted and inadequate settlement of their meritorious charges filed with the Board.

The charging parties have sought judicial review of each of these denials. The first is currently pending in the district court; the second is pending in the Court of Appeals and is before this Court pursuant to the instant petition; the third is also now pending in the Court of Appeals.[4]

REASONS FOR GRANTING THE WRIT.

Introductory.

The instant petition marks the fifth occasion within the past two years on which this Court has been requested to determine the status and the rights which charging parties enjoy in proceedings authorized by or resulting from Section 10(l) of the National Labor Relations Act. In *San Francisco-Oakland Newspaper Guild, et al.* v. *Kennedy*, 393 U. S. 926, this Court declined to decide whether charging parties properly may be denied an opportunity to intervene in an appeal of a favorable decision rendered by a district court under Section 10(l); in *Sears, Roebuck and Co.* v. *Local 419, Carpet Layers*, 397 U. S. 655, this Court declined to determine whether charging parties properly may be denied a right to seek appellate review of an adverse district court decision when the Board declined to seek such review; and in *Terminal Freight Cooperative*

4. In his Consolidated Complaint of July 2, 1970, the Director scheduled a hearing on the merits of the charges which gave rise to each of these matters. However, the Director has on three subsequent occasions, and in all instances on his own motion, postponed the convening of this hearing which is currently set for October 19, 1970, apparently for the purpose of awaiting judicial resolution of the issues raised in these appeals.

Association et al. v. *Samoff*, 90 S. Ct. 2171 (1970), this Court declined to decide whether a district court properly may deny to charging parties either the right to participate as parties-litigant there or the right to be heard on their objections to the manner in which their substantive rights and interests are adjudicated.

Currently, there is another case pending before this Court on a Petition for Writ of Certiorari to the Ninth Circuit, *The Los Angeles Herald Examiner, et al.* v. *Kennedy* (No. 350, October Term 1970),[5] which seeks once again a decision as to whether charging parties have standing to appeal adverse district court decisions rendered pursuant to cases filed under Section 10(l) and whether they may intervene as parties in the appellate consideration of such adverse decisions.

Finally, the instant case presents the question as to whether charging parties may participate as "parties" in the district court disposition of cases resulting from their filing of charges with the Board, based upon injuries they suffered as a consequence of the violation of their statutory rights for which the statute, in Section 10(l), provides relief to them from a continuation or repetition of the legal wrongs which they suffered.

The foregoing summary plainly reveals that the problem of defining the rights and the status of charging parties in proceedings under Section 10(l) is both a serious and recurring one. The absence of guidance from this Court can only serve to promote expensive and time-consuming litigation as charging parties in such cases, unclear as to their rights and the level of participation to

5. The Chamber of Commerce of the United States has filed a brief *amicus curiae* in support of the petition for writ of certiorari filed by The Los Angeles Herald-Examiner. The petitioners herein believe that the arguments made in that brief equally support our own petition and adopt on our own behalf the contentions and conclusions of that brief.

which the protection of those rights may entitle them, will continue to seek judicial clarification.

However, apart from the merits generally of a resolution by this Court of a problem which would otherwise inevitably give rise to recurring disputes, certiorari is also sought because the decision of the district court below is inconsistent both with the demonstrable intent of Congress and related decisions of this Court.

Although petitioners' appeal of the district court decision below is now pending in the Court of Appeals for the Eighth Circuit, certiorari is sought before judgment of that court in view of the fact that the same issues presented here are already pending in this Court in *The Los Angeles Herald Examiner, et al.* v. *Kennedy*,[6] and that the merits of the matters at issue have already been extensively briefed to this Court in each of the cases mentioned above, thus assuring this Court's familiarity with these matters and obviating the need to await the Eighth Circuit's decision.[7]

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6. This Court has frequently granted certiorari before judgment of the courts of appeals where similar or identical issues of importance are already pending in the Court. *Hannah* v. *Slawson*, 361 U. S. 910; *United States* v. *Thomas*, 361 U. S. 950; *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 12; *Hannah* v. *Larche*, 363 U. S. 420, 422, n. 3; *McElroy* v. *Guagliardo*, 361 U. S. 283; *Reid* v. *Covert*, 354 U. S. 1, 5; *White* v. *Mechanics' Securities Corp.*, 269 U. S. 283, 299; *Johnson* v. *U. S. Shipping Board*, 280 U. S. 320, 324-25; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-12, 415, n. 2; *Bolling* v. *Sharpe*, 344 U. S. 873; *Porter* v. *Dixon*, 328 U. S. 252, 254.

7. Petitioners are informed by the Clerk of the Eighth Circuit that the earliest date on which that court could hear oral argument in this case is the Spring of 1971.

The delay which would result in awaiting the decision of the Eighth Circuit constitutes an additional basis for granting the instant petition. When this Court granted certiorari in *Sears, Roebuck and Co.* (No. 476, October Term, 1969), it signified its awareness of the general importance of the issues presented there. This Court failed to reach the merits of the questions presented in *Sears* because of the intervening decision of the Board. Such a

A. The Scheme of the National Labor Relations Act Evidences Congress' Intent That Charging Parties Constitute "Parties" in Proceedings Under Section 10(l).

In general, Section 10(l) constitutes a mandatory direction on the Board's agents to file a petition for injunctive relief in aid of aggrieved charging parties whenever it appears that there is reasonable cause to believe that the latter's charges are true that they have been victimized by certain illegal strikes, picketing or boycotts prohibited by Sections 8(b)(4) and 8(b)(7) of the National Labor Relations Act. Section 10(l) goes on to provide, in relevant part:

> "Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, *including the charging party,* shall be given an opportunity to appear by counsel and present relevant testimony . . ." (Emphasis added.)

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decision will almost surely also issue in the instant case by the time the Eighth Circuit renders its decision. In order to avoid that eventuality, however, petitioners have attempted, without success, to expedite the argument and briefing schedule in the Eighth Circuit. For example, Sears' notice of appeal from the denial by the district court of their right to participate as parties or to intervene was filed on July 10, 1970, two days following the district court's decision, and Terminal followed suit on July 16. (App. L and M, pp. A 64 and A 68.) The appeal was docketed on July 15, 1970. On July 21, 1970, Sears filed a motion for stay and expedited briefing schedules. (App. O, p. A 81.) Said motion was denied in all respects by the court on August 12, 1970, although the Board had made no objection to expedition. (App. P, p. A 87.) Petitioners once again attempted to expedite hearing before the court by seeking, on August 21, 1970, to join for briefing and argument all of the cases pending in the Eighth Circuit on the related issues . . . "at the earliest possible times". This motion was opposed by the Board and denied by the court on September 2, 1970.

Accordingly, the failure to grant this petition for writ of certiorari before judgment below will only perpetuate the inability of charging parties to secure a resolution of the important and recurring questions presented herein.

While Section 10(l) states nothing further regarding any participants' additional rights in the district court proceedings, and nothing whatever regarding any appellate rights, it is by now well established that the fact of Congressional silence does not, by itself, govern the question of their existence of non-existence. This Court has frequently found rights to exist in the face of Congressional silence when an analysis of the statutory scheme reveals an uncodified Congressional purpose.[8]

Analysis of Section 10(l), in conjunction with the statute of which it is a part, strongly suggests that Congress intended charging parties to enjoy the status of "parties" under Section 10(l), possessing all the rights and privileges of that status.

In fashioning the statute, Congress everywhere made the participation and interests of the charging party central to all proceedings authorized in the Act.

1. Participation by the Charging Party.

(a) In Section 10(b) Congress made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Board complaint;

(b) Under the Board's construction of the Act, it has accorded the charging party the status of a full party litigant in all proceedings before the Board, without limitation as to the various stages of the proceedings involved;[9]

(c) The charging party is accorded the right to appeal

8. *Scripps-Howard Radio, Inc.* v. *F. C. C.*, 316 U. S. 4, 11; *U. A. W.* v. *Scofield (Fafnir Bearing Co.)*, 382 U. S. 205; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150; *Barlow* v. *Collins*, 397 U. S. 159.

9. Section 102.8 of the Board's Rules and Regulations and Statements of Procedure, Series 8, as amended, defines those who shall be deemed a "party" before it and includes in that group ". . . any person filing a charge or petition under the act, . . ."

adverse decisions of Trial Examiners to the Board, in Section 102.46(a) of the Board's Rules;

(d) The charging party is accorded the further right to seek, after issuance of the Board's order, a reopening of the hearing, rehearing, or reconsideration; Section 102.48(d) of the Board's Rules;

(e) The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review of final orders of the Board if the Board refuses any of the relief sought by the charging party. (*Albrecht* v. *N. L. R. B.*, 181 F. 2d 652 (CA 7, 1950) and cases there cited);

(f) Just as a charging party independently may seek appellate review in all cases where he was unsuccessful before the Board, similarly, he may participate as a full party in the appellate review of cases where he was successful. (*U. A. W.* v. *Scofield, supra*);

Thus, by filing a charge the charging party becomes a full party before the General Counsel in the investigative stage, before a Trial Examiner after Complaint has issued and with full appellate rights, before the Board on review of the Trial Examiner's decision, in the appellate courts after the Board's decision, and with the right independently to seek certiorari from this Court.

It is against this background that the district court below adopted the Board's argument that Congress' failure *specifically* to label charging parties as "parties" in district court proceedings brought by the Board establishes Congress' intent that they should not possess that status there; although they do possess it for all other purposes, whether expressly provided by Congress or not, in all other proceedings authorized in the Act.

2. Recognition of the Interests of the Charging Party.

Not only does the Act accord to charging parties the status of full "parties" in all proceedings before the Board, and clothe them with all the procedural safeguards customary to that status including the right to seek review at all levels of those proceedings, but the Act also recognizes that the rights which are thus protected include the charging parties' private or parochial rights and interests. One of the principal holdings in *U. A. W.* v. *Scofield, supra,* was precisely the proposition that the Act recognizes and enforces the private rights of aggrieved parties, and not merely generalized "public rights". Thus, the right to be free of the effects of an unlawful secondary boycott, while it is a right which the Board enforces in the public interest, is also a private enforceable right of the aggrieved victim of that boycott.

One of the means by which the Act affords relief from the effects of unlawful boycott activity is the provision for injunction found in Section 10(l). Hence, to say that the Act enforces private rights means that there is a private right to the relief provided in Section 10(l). However, there would be no point to recognizing the distinction between a private and a public right if the private beneficiary were not accorded a role separate and independent from the Board in securing and protecting it.

The nature of that role is only consistent with "party" status. This result follows from the fact that such a status is conferred upon charging parties for every other purpose and in every other respect under the Act. It follows from the inescapable conclusion that the private rights protected under Section 10(l) are as significant as any others recognized by the Act and for whose protection and

enforcement party status is conferred.[10] And it follows by implication from the terms of Section 10(l) itself.

Manifestly, the enumerated rights of participation granted charging parties in Section 10(l) exceed those associated with the status of an *amicus curiae*. An *amicus* is not entitled to participate actively in the development or introduction of evidence, or to raise objections, or to make argument during the course of the litigation; he is limited instead, and only with the Court's permission, to oral argument or the filing of briefs *after* the record is made. However, the express and necessarily implied provisions of Section 10(l) permit charging parties, without need of the court's permission, to be represented by counsel throughout the proceedings, to call and cross-examine witnesses, to offer contentious evidence, to introduce documentary and other relevant matter, to make and respond to oral argument and to file briefs. In exercising these rights the charging parties not only create the record which will govern their destinies in the district court, but they also narrow the issues and shape that record for appellate review. Were the statute intended to relegate charging parties to the status of *amici*, then their role would not have been expanded to permit such full and active participation as a matter of right.

Congress' intent to afford charging parties under the Act the full participatory role exercised only by "parties" is further evidenced by what Congress provided in the Judicial Review Act, 5 U. S. C. §§ 103-42.

The latter statute, which purported to import the pro-

10. The fact that Congress imposed a *mandatory* duty on the Board to enjoin the unlawful strikes and boycotts which constitute the subject matter of Section 10(l) proceedings, whereas the Board was merely given the *discretionary* power, in Section 10(j) to seek injunctive relief against all other types of unfair labor practices, reveals Congress' view of the relative significance of the private rights protected by Section 10(l).

cedures of the National Labor Relations Act into the schemes of other Federal agencies, contains the following relevant provisions in § 1038:

> "The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as *parties* thereto on their own motion and as of right, and be represented by counsel in any proceedings to review such order . . ."
>
> "The Attorney General shall not dispose of or discontinue said proceeding to review over the objection of such *party or intervenors* may prosecute, defend, or continue said proceeding unaffected by the action or non-action of the Attorney General therein." (Emphasis added.)

In short, if Congress had not intended charging parties to function as "parties" in proceedings under Section 10(1), then they would not have granted them rights under that Section such as only "parties" can exercise and which they may exercise as "parties" in pursuance of their private interest for all other purposes under the Act.

B. Whether or Not Charging Parties are Conferred "Party" Status Under Section 10(1), They Have a Right to Intervene in all Proceedings Related Thereto.

1. The Right of Charging Parties to Function as "Parties" Under Section 10(1) Through Intervention is Established By Analogy to Their Standing to Secure Appellate Review.

Respected scholars and courts have expressed the view that interests which are adequate to confer standing to seek judicial review are also adequate to confer the right to participate as parties in the proceeding from which review may be sought. Professor Davis has concluded that:

> ". . . the problem of right to intervene in administra-

> tive proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action."[11]

This view has found judicial approval, for example, in the Court of Appeals for the District of Columbia Circuit:

> "Cases concerning the question of standing [to seek review] have been used interchangeably in resolving questions of standing to intervene. Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene." (Footnote citations omitted.)[12]

The conclusion stated in the quoted excerpts, while addressed specifically to status in and the review of administrative proceedings, should not be limited to such proceedings since the logic which supports that conclusion has universal applicability.

The criteria for determining when standing to seek review exists, have recently received extended attention from this Court in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970) and *Barlow* v. *Collins*, 397 U. S. 159 (1970). The tests for determining such standing were stated by this Court as follows:

(1) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise" and

(2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the stat-

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11. I DAVIS, ADMINISTRATIVE LAW TREATISE § 8.11 at 564 (1958).

12. *The National Welfare Rights Organization, et al.* v. *Finch, et al.* (nos. 23,787, 23,890, CA DC, decided June 9, 1970), slip opinion, pp. 13-14.

> ute or constitutional guarantee in question." (*Data Processing Service, supra,* 397 U. S. 150 at 152, 153.)

As judicially interpreted and clarified, an injury of any kind in fact to any person or group which is the beneficiary of the statute under which the plaintiff raises his claim is sufficient to confer standing to seek review, unless the statute expressly or by necessary implication provides otherwise.[13]

Whenever a litigant's interest in the result of a suit is sufficient to permit him to obtain appellate review of an adverse result, then that interest should also entitle him to the fullest participatory role in the conduct of the suit, whether it is an administrative or a judicial proceeding.

> "The right of judicial review cannot be taken as fully realized, however, if appellants are excluded from participating in the proceeding to be reviewed."[14]

It follows, therefore, that if petitioners herein have standing to review the merits of an adverse decision rendered in a district court proceeding under Section 10(l), then they are entitled to function in that district court proceeding as "parties", through intervention if necessary, in

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13. The fact that Congress may not *expressly* have conferred standing on the group of which the complainant is a member is not controlling. Standing results from the satisfaction of the two stated criteria, in reliance upon the evidence of Congress' intent which is afforded by the Administrative Procedure Act, 80 Stat. 392, S. U. S. C. § 701 *et. seq.*, in which Congress provided, in § 702:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

See also *Barlow* v. *Collins, supra,* 397 U. S. at 164-5; *The National Welfare Rights Organization, supra.*

14. *The National Welfare Rights Organization, et al., supra,* slip opinion, p. 21.

order to protect their vital interests and avoid any subsequently reviewable injury.

The application to the facts of this case of the tests defining standing to seek review reveals that the petitioners should have been permitted by the district court below to intervene and participate as full party-litigants even if, in the court's view, they did not affirmatively possess the status of "parties" under Section 10(l) in the proceedings there: Section 10(l) affords relief to them from violations of their right to be free of unlawful secondary boycott activity; an adverse decision by the district court in refusing to grant relief, or in granting lesser relief then that initially sought by the Director and subsequently urged by petitioners would clearly constitute an injury to interests for whose very protection Section 10(l) was enacted.

In fact, by approving the Director's and Union's proferred Stipulation in lieu of granting injunctive relief pursuant to the then pending petition, the district court did inflict such injury. The Stipulation, which was approved over the charging parties' objections, was not an adequate substitute for the statutorily-guaranteed right to injunctive relief. Whereas the granting of an injunction after a hearing requested by the charging parties would have the significant deterrent effect of subjecting a violating party to proceedings in contempt, the Stipulation had no such deterrent effect. That Stipulation constituted only an agreement not to engage in secondary boycotts which, if violated, permitted the Board, when and if it was able and disposed, to secure from the district court an *ex parte* restraining order. Such an order, pursuant to the express terms of Section 10(l), would expire after five days. For any further relief, a full hearing is required with notice and full participatory rights guaranteed to all parties.

Thus, the resumption of unlawful boycott activity by the Union would not have subjected it—nor would such a resumption subject it now—to contempt but would only have entitled it to a full hearing whose conclusion could only have yielded precisely that injunction to which the charging parties had claimed themselves to be entitled from the outset.[15]

Apart from the delays and the absence of genuine deterrent effect inherent in this procedure, the district court's failure to recognize the charging parties' "party" standing under Section 10(l) yielded further damage to their legitimate interests. Pursuant to the Stipulation actually approved by the district court only the Board was empowered to petition the court for relief should the Union resume its unlawful conduct. However, had the district court acknowledged the charging parties' status as "parties", then those charging parties could have acted unilaterally to bring to the court's attention any subsequent resumption of the unlawful conduct which caused the Board to file for injunctive relief in the first instance and without the delays inherent in the administrative process which traditionally inhibits the Board's ability to move with equivalent dispatch. Moreover, the Stipulation approved by the court failed to set forth any findings of fact giving rise to the prohibitions contained therein, creating a needlessly difficult problem in determining whether a resumption of picketing would in fact violate any such prohibitions.

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15. Nor has the Stipulation succeeded in resolving any disputed contentions. The district court rejected the initial Stipulation proposed in the Section 10(l) proceeding because the union insisted on its right to picket these petitioners; the Board's Complaint alleged all such picketing to be unlawful. The Stipulation as finally approved did not incorporate the Board's view; rather, it was silent on the question as to whether, and under what conditions, the Union might engage in such picketing in the future. Therefore, instead of defining both parties' rights and limitations, the approved Stipulation finesses that all-important problem and invites future disputes.

Nor are these matters of merely academic interest today, for the Union may at any time resume its picketing of these neutral charging parties pursuant to any current or future dispute with the same primary employer. The fact that a contract was executed between the primary and the Union during the course of the litigation below does not warrant the conclusion that the Union will have no further disputes with that company—as, for example, in the interpretation and enforcement of that contract—and that the Union will not seek once again to apply pressure to the primary by picketing these neutral charging parties. The real possibility of such a resumption, coupled with the inadequacy of the remedy afforded by the Stipulation, further evidences the injury to the charging parties which has resulted and does result from the erroneous decisions of the district court which the instant petition for writ of certiorari seeks to review.

Thus, whereas Section 10(l) requires the mandatory seeking of injunctive relief none was sought or obtained, all over the objection of petitioners who were unable to make an adequate record on their own behalf, who were neither present when the Court approved the Stipulation nor even on notice that the court was then considering such approval, and who had not even been afforded the opportunity to examine the document prior to its approval by the court, all in violation of the rights granted them in Section 10(l) and as a consequence of being denied the right to participate as parties or to intervene.

Accordingly, under the tests of *Data Processing Service* and *Barlow, supra,* that standing to seek review follows from (i) an injury to a plaintiff, (ii) sustained pursuant to an alleged misapplication of a statute under

which plaintiff raises his claim, petitioners herein have standing to review the decision of the district court.[16] And pursuant to authorities holding that the possession of that standing confers on such plaintiffs the right to participate as party-litigants in the proceedings ultimately to be reviewed,[17] petitioners should have been accorded that right in the district court below.

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16. While the question of the right of charging parties to review the merits of district court decisions rendered under Section 10(l) has not been definitively adjudicated, the existence of such a right appears to follow necessarily from this Court's decisions in *Data Processing Service* and *Barlow*. The only contrary appellate court result was expressly vacated by this Court in *Sears, Roebuck and Co.* v. *Carpet Layers Union, supra.* See also *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492; *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335.

The Norris-LaGuardia Act, 29 U. S. C. A. § 107, does not constitute a bar to such review. The proscriptions of that Act were not designed to affect judicial review of a case already properly lodged in the lower courts.

> "This measure was intended to curb the abusive power registered by certain federal judges in the promiscuous issuing of injunctions arising out of labor disputes. It has application only to the inferior federal courts of the nation, and limits the jurisdiction and power of those inferior federal courts." (Rep. Sweeney, 75 Cong. Rec. 5502.)

As related to Section 10(l) of the National Labor Relations Act, the inapplicability of Norris-LaGuardia to the question of review is established by Section 10(h) of the Labor Act which specifically exempts Norris-LaGuardia from all proceedings authorized under any of the subsections of Section 10. See also *Retail Clerks Union* v. *Food Employers Council*, 351 F. 2d 525 (CA 9, 1965), and *Houston Insulation Contractors Assn.* v. *N. L. R. B.*, 339 F. 2d 868 (CA 5, 1964).

17. *American Communications Association* v. *U. S.*, 298 F. 2d 648, 50-1 (CA 2, 1962); *National Welfare Rights Organization et al. supra;* DAVIS, ADMINISTRATIVE LAW TREATISE, *supra; In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1005 (CA 3, 1941); *Gleeson* v. *Carr*, 219 F. 2d 64, 67 (CA 9, 1955); cert. den. 350 U. S. 827; *Ashbacker* v. *F. C. C.*, 326 U. S. 327.

2. Charging Parties' Right to Intervene in Proceedings Under Section 10(l) Also Derives from This Court's Decision in UAW v. Scofield (Fafnir Bearing Co.)

The district court's decision below refusing to permit petitioners, charging parties before the Board, to intervene in proceedings under Section 10(l) is in conflict with this Court's decision in *Scofield.*

In *Scofield,* this Court argued generally for the fullest participation by charging parties in the judicial consideration of cases initiated by their charges with the Board. Although the precise question involved there related to the right of successful parties before the Board to intervene in review proceedings of final Board orders in the appellate courts, the rationale of the decision applies as well to intervention rights in the district court. The same "private interests" are at stake in both; the same possibility of injury to those vital interests exists in both. While in both tribunals, the charging parties' interests are represented by the Board's agents, nonetheless, just as the Board's presence and representation does not exclude the exercise by charging parties of an *independent* role in appellate deliberations, so also the same representation should have no greater effect in the district court when comparable rights and potential injuries are involved. Moreover, the advantages which, according to *Scofield,* accrue to the process of judicial deliberation through permitting intervention in enforcement proceedings in the appellate courts, apply as well to Section 10(l); these consist of evolving the fullest record for review, simplifying and clarifying the issues, and, in general, placing the matter before the court in the best posture for securing a thoughtful and encompassing decision.[18]

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18. The applicability of *Scofield* to district court proceedings finds support from Professor Jaffe:

"If the statute allows a party to appeal from an adverse

In brief, this Court's decision in *Scofield*, that the Board does not have *exclusive* authority to represent and protect the particular and private interests of the charging parties applies as a matter of logic to all proceedings in all tribunals where those interests are involved and require informed and interested protection.

Finally, apart from the fact that, by refusing to permit intervention by the charging parties, the district court below ignored the logic of this Court's *Scofield* decision, it also erred in failing to apply Rule 24(a)(2) of the Federal Rules of Civil Procedure. This Rule provides:

> "*Intervention of Right.* Upon timely application, anyone shall be permitted to intervene in an action . . . When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In rejecting the Board's claim in *Scofield* that it should function as the charging parties' sole representative, this Court established the proposition that the charging parties' private interests which the Act recognizes and protects are not "adequately represented" by the Board. It follows, therefore, that Rule 24(a)(2), which this Court applied by analogy to appellate proceedings, should directly have been applied by the district court below in permitting the charging parties to intervene there.

Board decision why not from an adverse judicial ruling? I am not a friend to loose intervention practices, to practices which threaten to encumber administrative hearings and judicial review. But the interest of a charging party—as the statute itself makes clear—is central to the whole proceeding. To allow intervention merely accords to that interest a customary protection." Jaffe, *Judicial Control of Administrative Action*, p. 545 (1965).

3. The Authorities.

In general, courts which have dealt with the question of the status of charging parties under Section 10(l) are in disharmony.

Whereas the Ninth Circuit, in *The LosAngeles Herald-Examiner* case now pending in this Court, held that charging parties lacked standing to seek a stay of a district court's dissolution of a Section 10(l) injunction, or to intervene in the Board's efforts to secure such a stay, the Fifth Circuit held to the contrary in *Houston Insulation, supra.*

In *Henderson* v. *International Union of Operating Engineers, Local 701,* 420 F. 2d 802 (CA 9, 1969), the Ninth Circuit concluded that the successful charging party in a 10(l) proceeding lacked standing to constitute an "appellee" in the court of appeals and was relegated to the status of *amicus curiae.* However, the court's analysis of Section 10(l) appears to be inconsistent with its conclusion. At footnote 2 of its decision the court stated:

> "Under [Section 10(l)], *any* person involved in the charge is entitled to appear in the district court by counsel and to present relevant testimony. If the order entered by the district court aggrieves *any* such party, it undoubtedly has the right to appeal." (Emphasis added.)

Thus the court appears to hold that while a successful charging party may not intervene in an appeal of that successful result, if he loses in the district court then he may appeal the unsuccessful result himself. Such a decision is, apart from its logical infirmity, totally inconsistent with this Court's holding in *Scofield, supra.*

And in *San Francisco-Oakland Newspaper Guild* v. *Kennedy,* 404 F. 2d 37 (CA 9, 1968), cert. den. 393 U. S. 926, the Ninth Circuit similarly held that a successful charging

party could not intervene in the appellate review of a Section 10(l) proceeding. That decision, too, appears to be in conflict with *Scofield,* with the Second Circuit's decision in *McLeod* v. *General Electric Co.,* 366 F. 2d 847 (CA 2, 1966), and with various district courts which have found the right to intervene to be part of the scheme of 10(l). See *Kaynard et al.* v. *Amalgamated Meat Cutters and Butcher Workers of North America, AFL-CIO* (D. C., E. D. N. Y. No. 69 C 1597, 62 LC ¶ 10750 (1970)); *David* v. *Hotel and Restaurant and Bartenders International Union, et al.* (D. C. Okla., No. 66-68, 1966) (unreported but described in the Thirty-first Annual Report of the N. L. R. B., at 155-6); and *Penello* v. *Plumbers Local Union No. 5,* 41 LRRM 2269 (D. C. Va. 1957):

> "Section 10(l) of the Act plainly authorizes participation by the charging party. Intervention is necessary to implement this right." (Citations omitted.)

The principal judicial authority in the interpretation of Section 10(l) is an earlier Ninth Circuit decision, *Retail Clerks Union, Local 137* v. *Food Employers Council, Inc.,* 351 F. 2d 525 (CA 9, 1965). The pre-eminence of this decision derives not only from the fact that its analysis is much more detailed than that of any other decision on the subject, but also from the fact that its merits were specifically approved by this Court in *Scofield.*

The question before the Court in *Retail Clerks,* as it is here, concerned the extent and the nature of the rights possessed by charging parties pursuant to Section 10(l) in the district court proceedings to which their charges gave rise.

In Retail Clerks, pursuant to an appropriate charge filed with him and his investigation thereof, a Regional Director filed a petition in a district court for a temporary injunction under Section 10(l) to prevent a union from enforcing

an alleged "hot cargo" agreement. Thereafter, instead of pursuing his pending petition for injunctive relief, the Regional Director executed a Stipulation with the offending union according to which the latter would cease its alleged unlawful conduct. The Regional Director filed this Stipulation in the district court and sought its approval by that Court in lieu of injunctive relief. The charging parties, however, objected to the approval of the Stipulation and urged the court to grant injunctive relief pursuant to the Regional Director's pending petition.

Thus the facts of *Retail Clerks* mirror those in the instant proceeding. The district court in *Retail Clerks,* however, recognized the charging parties' right to an effective hearing on their objections to the Stipulation, unlike the district court below. After hearing the evidence, that court granted the injunction as the charging parties requested and over the objection of the Regional Director. The union and the Regional Director then appealed from the order granting the injunction.

In his appeal, the Regional Director contended, *inter alia,* that the private charging parties lacked standing either to urge the granting of injunctive relief under Section 10(l) or to oppose the Regional Director's modified request for relief in the district court.

With respect to the Regional Director's first contention, the Court held that while only the Regional Director may *initiate* suits for injunctive relief pursuant to the mandatory duty imposed upon him by Section 10(l) whenever he has reasonable cause to believe that one of the sections enumerated therein has been violated, that once he has done so, no statutory provisions or policy inhibits the charging parties' *right* to urge the granting of injunctive relief. So long as the urging of the charging parties is consistent with the facts, theories and relief sought in the petition, they may actively *support* it despite any sub-

sequent attempted change of position by the Regional Director. The distinction between "initiate" and "support" was found to be critical. Accordingly, the Ninth Circuit held that district courts may grant injunctions at the urging of charging parties and over the objection of the Regional Director, in cases under Section 10(l):

> ". . . where the charging parties did not petition the court independently or for relief different than that sought by the Regional Director, *but merely supported the original petition for injunctive relief requested by the Regional Director.*" (Emphasis added.)

In the instant case, as well as in the *Retail Clerks* case itself, the charging parties' objections to the Stipulation proposed by the Regional Director were in "support" of the "original petition for injunctive relief requested by the Regional Director." Hence their efforts constituted a legitimate exercise of rights in aid of a legally permissible objective, according to the *Retail Clerks* test.

The Regional Director's second appellate contention, in which he attacked the charging parties' standing to object to his decision to seek a lesser remedy than an injunction despite the pendency of his petition, was found to be equally non-meritorious. The Ninth Circuit expressly held the language of Section 10(l), in which charging parties are guaranteed the right to notice, to participation by counsel, and to an equal role in the development of relevant evidence in district courts, as sufficient to confer such standing. Moreover, the court reached the same conclusion less directly when it stated that district courts should grant appropriate relief in injunction suits under Section 10(l) whether or not the Regional Director persists in seeking such relief after he files his petition. However, if the Regional Director does not seek the injunction the district court cannot grant it *sua sponte*. It follows, therefore, that charging parties must have standing to urge such relief independently of the Regional Director if the district court

is to have an option to grant it in the event of the Regional Director's change of position.

In summary, the Ninth Circuit's decision in *Retail Clerks* constitutes indistinguishable precedent for the propositions that charging parties in cases under 10(l) have the right to be heard in the district court to urge the granting of injunctive relief, in support of and pursuant to the Regional Director's pending petition, whether or not the Regional Director continues to seek such relief. Similarly, they have standing to object to his refusal to persist in his efforts to secure such relief or to his decision to seek lesser relief. The right to make and be heard on these objections necessarily implies that the charging parties are entitled to the holding of a hearing on those objections despite the Regional Director's desire to dispense with such a hearing and to accept other and lesser than injunctive relief. And the combination of these rights should be understood to confer on charging parties the right to participate as full party-litigants in the district court, either directly or through intervention; those are the rights which are commonly exercised only by "parties", and there are no further or greater rights which could meaningfully be exercised within the statutory scheme of the Act.

C. This Court Should Not Refuse to Adjudicate Either the Instant Case or the Pending Los Angeles Examiner v. Kennedy (No. 350, October Term, 1970) on the Basis of Mootness.

In the instant matter, the Respondent Union's unlawful secondary picketing has ceased, at least temporarily, and the dispute which gave rise thereto, to which dispute these petitioners were strangers, has been settled. However, there has as yet been no "final adjudication

of the Board'' such as would moot the case,[19] and the petition for injunctive relief filed by the Regional Director remains on the docket of the district court pending such a ''final adjudication''.[20] Accordingly, this case is neither ended, nor is it technically moot, although petitioners are not presently in need of relief from the conduct which gave rise to their original charges filed with the Board. Under these circumstances, the Board is likely to oppose the instant petition for writ of certiorari on the basis of mootness.

Similarly, in the Los Angeles Examiner case, involving the same issues as are presented here and currently pending decision in this Court on the charging parties' petition for writ of certiorari, the Board has, within the past few weeks rendered a final adjudication on the underlying case and has indicated that it will contend that the case has become moot.

In the interest of affording a needed definition of charging parties' rights in cases arising under Section 10(l) and in obedience to governing precedent, it is urged that this Court reject any such contention.

In determining whether disputes are moot in which the complaining party is without an immediate and present jeopardy, this Court has evolved two distinct lines of cases. One of these, in which mootness results, is illustrated by *Brockingham* v. *Rhodes,* 396 U. S. 41 and *Hall* v. *Beals,* 396 U. S. 45. The other, in which mootness does not result, is exemplified by *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498 and *Moore* v. *Ogilvie,* 394 U. S. 814.

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19. *Sears, Roebuck and Co.* v. *Carpet Layers Union, supra.*

20. The petitioners have objected strenuously to the Regional Director's efforts to secure a settlement of the case on the grounds of the total inadequacy of that settlement to remedy the unlawful acts which have occurred and may recur. Should the Director overrule these pending objections, an appeal of his decision will be taken at least as far as the Board.

It is submitted that both the instant case and the pending *Los Angeles Herald Examiner* case are controlled by the *Southern Pacific* and *Moore* line of authority.

Brockington and *Hall* involved situations in which an individual sought to have his name placed on the ballot as a candidate for a particular office in a particular election (*Brockington*), and sought to be permitted to vote in a particular election (*Hall*) but was prevented from doing so pursuant to the operation of a statute which had subsequently been amended. At the time these cases reached this Court the statutory amendments had been effected and the specific elections involved had already been conducted. These cases were held to be moot not only because of an inability to grant the particular relief which had been sought but, more significantly, because a repetition of the kind of injuries complained of could not recur in view of the statutory amendments. That is, in practical terms, it was *impossible* for the claimed injury to recur either to the individual complaining parties or to any others who might have been similarly situated.

In the *Southern Pacific* and *Moore* line of cases no such *impossibility of recurrence* of the specific claimed injury existed; that represents the essential distinguishing characteristic between the two lines of cases since the absence of either a need for, or an ability to afford, effective immediate relief is common to both.

Southern Pacific involved an attempt to review a short-term order of the Interstate Commerce Commission which had expired pending review. *Moore* involved a challenge to the validity of a statute whose provisions effectively deprived the complainant of an opportunity to run for elective office; although the election had already taken place when the case came before this Court the statute which caused the alleged deprivation remained in full effect.

In holding that the latter cases were *not* moot, this Court relied on the fact that in each instance the claimed injury might recur in the *future* even though no meaningful relief could be afforded the litigants before the Court on their precise claim of injury. Thus, in *Southern Pacific*, the Interstate Commerce Commission might in the future promulgate a similar order, of a similar short-term duration, and absent the Court's determination of its propriety such an order would forever be "capable of repetition, yet evading review". Similarly, the continuing existence of the challenged statute in *Moore*, together with the fact that it had been interpreted and applied for over 30 years in the same manner as was being challenged, assured its *prospective effect* of keeping candidates off the ballot.

Particularly significant in both *Southern Pacific* and *Moore* was the fact that this Court did not require that the future injury to which a recurrence of the challenged activity could give rise must affect the precise parties then before the Court; the contention of mootness was overcome so long as any persons or groups in the same situation or class as those parties could have been similarly affected by a recurrence of the alleged improper conduct.

Analysis of the facts both of the instant case and those of the *Los Angeles Herald-Examiner* case reveal that they belong within the ambit of *Southern Pacific* and *Moore*.[21]

Both herein and in *Los Angeles Herald-Examiner*, the injury complained of is the refusal to recognize charging parties status as "parties" in district court or appellate court proceedings under Section 10(l), or to permit them

21. The continuing vitality of the *Southern Pacific* and *Moore* doctrine is evidenced by a continuing judicial adherence to it. *Reverend Thomas B. Allen, et al.* v. *Hickel, et al.*, ... F. 2d ..... (CA DC, 1970); *Women Strike for Peace* v. *Hickel*, 420 F. 2d 597 (CA DC, 1969); *Friend* v. *United States*, 388 F. 2d 579 (CA DC, 1967).

to intervene in such proceedings. The question of the existence of "party" or "intervenor" status and the related question of the identification of the rights flowing from either of them is and will continue to be relevant at every stage of every case arising under Section 10(l). For example, they will govern the conduct of charging parties in every district court proceeding in which they contemplate any independent action or any action which the Board will not initiate on their behalf or with which the Board will not join; and they will arise in every instance in which the district court refuses to grant injunctive relief and the Board declines to appeal that denial. Moreover, assuming the validity of petitioners' substantive contentions herein, *prospective* injury to their interests and the interests off all other charging parties in proceedings under Section 10(l) seems assured, absent resolution by this Court, since the Board continues to assert in all such proceedings that charging parties do not constitute "parties" and may not intervene therein, and lack standing to appeal erroneous and adverse district court decisions.

Just as the test of *Southern Pacific* and *Moore* that there exist a possibility of future injury from a recurrence of the denial of claimed rights is satisfied in the cases currently pending in this Court, so also is the corrollary requirement that failure of the Court to decide the question because of mootness will result in a situation where the deprivations alleged will continue to evade review.

Pursuant to the terms of Section 10(l), injunctive relief afforded to aggrieved victims of unlawful strikes or boycotts is short-term in nature, extending only until the Board renders its "final adjudication" of the merits of the underlying dispute. Analysis of cases litigated under Section 10(l) during 1967 reveals that the average elapsed time between the district court's hearing on the petition

for injunctive and the Board's order on the underlying case is approximately ten (10) months. It is not feasible to bring a case to this Court within so short a period. Indeed, if the Board's "final adjudication" would necessarily render moot all cases arising under Section 10(l), it would be virtually impossible ever to secure from this Court a decision involving charges of judicial malfunction or error concerning or arising out of the granting or denying of injunctive relief in such cases; those cases would almost surely become "moot" as they proceeded through each of the time-consuming stages of the judicial process. And not only would the errors committed en route evade correction but they would assume the stature of "precedent" to aggrieve the same and other charging parties in similar future cases. This is precisely the danger which gave rise to *Southern Pacific* and *Moore*.

With respect to the *Los Angeles Herald-Examiner* case, the issuance of the Board's order limits the *relief* to which that Company may thereafter be entitled without rendering the case moot so as to deprive both it and the public of the opportunity to achieve a clarification of the rules which guide their conduct and describe their rights.[22]

With respect to the instant case, however, there has been no "final adjudication of the Board", and the matter re-

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22. The "public interest" aspect of the *Southern Pacific* doctrine has represented to commentators in the field a particularly cogent argument in support of that doctrine:

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the de-decision could have no substantial effect on the parties who originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted.) (Note, *"Moot" Administrative Orders*, 53 Harv. L. Rev. 628, 630 (1940).

See also Note, *Mootness On Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970).

mains pending on the district court's docket. Thus, any contention that the case is moot reduces to the claim that the respondent union's cessation of its unlawful picketing and the settlement by the disputing parties of their underlying dispute obviates the need to proceed further. Such a claim should fail, wholly apart from the proper application here on the *Southern Pacific* doctrine, in light of this Court's reiterated conclusion that the cessation under legal duress of unlawful conduct and the private resolution or settlement of the underlying dispute which gave rise to such conduct do not render a case moot when there exists even a possibility of recurrence of the illegal conduct.[23]

Apart from the requirements of the *Southern Pacific* doctrine and the interest of the public generally in a resolution of a recurring and troublesome problem, a finding of mootness here would detract from the efficient operation of the judicial process. Since, as this Court stated in *Flast* v. *Cohen*, 392 U. S. 83, 106, the mootness doctrine is intended to insure "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution," the instant case could not be deemed moot. The underlying questions remain unresolved; the continuing adverse position of the Board is assured; and the petitioners represent an injured and interested class of persons, and a repetition of the claimed injury from the same source will surely occur.[24]

In short, the mootness doctrine should not be employed as a device either to thwart review in whole classes of

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23. *Bakery Sales Drivers* v. *Wagshall*, 333 U. S. 437; *N. L. R. B.* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, *Local 1976, United Brotherhood of Carpenters and Joiners* v. *N. L. R. B.*, 357 U. S. 93; *N. L. R. B.* v. *Raytheon Company, et al.*, 398 U. S. 25.

24. See also *Goldberg* v. *Kelly*, ... U. S. ....., 25 L. Ed. 287 (1970); *Sibron* v. *New York*, 392 U. S. 40, 52-3.

cases or to avoid resolution of issues of importance where, in either event, there is a likelihood that the substantive questions involved will recur, will continue to jeopardize the interests of these petitioners and others of the same class, will continue to evade review, and where there exists a guarantee that the issues will be fully and forcefully litigated by the opposing parties.

> "[M]ootness should never perpetually frustrate 'the vital importance of keeping open avenues of judicial review.' If the court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness . . . [T]he real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity."[25]

CONCLUSION.

For the foregoing reasons, it is urged that this petition for writ of certiorari before judgment be granted.

Respectfully submitted,

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25. Note, *Mootness on Appeal in the Supreme Court*, supra, at 1692.